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Supreme Court, U.S.
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No. 95-995

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MURPHEY FAVRE, INC.,
WASHINGTON MUTUAL SAVINGS BANK,
GREGORY ONDRAK, JAMES ROYAN and
DOUGLAS SPRINGER,

Petitioners,

v.

PAUL M. LYNN, on behalf of himself and
all similarly situated person, and THE DISTRICT
COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE SATE OF MONTANA, IN AND FOR THE
COUNTY OF MISSOULA, THE HONORABLE
JOHN S. HENSON, PRESIDING JUDGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent PAUL M. LYNN ("Respondent") respectfully submits that the questions presented for review, as phrased by Petitioners, are inaccurate. The correct questions for review are:

1. Is a state court's determination in a class action that it has personal jurisdiction over nonresident absent class members binding upon the resident state court of those absent class members where they did ***not*** participate, either personally or through an authorized representative, in the proceedings in the nonresident state court?

2. May absent, nonresident class members collaterally attack the jurisdiction of a distant forum over them in the courts of their state of residence where they did ***not*** participate, either personally or through an authorized representative, in the proceedings in the nonresident forum?

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STATEMENT OF THE CASE

Petitioners have selectively cited the record below, and ignored important facts from the record, in their Petition for a Writ of Certiorari dated December 21, 1995 ("Petition"). This section will clarify the factual record.

The action ("Montana Action") from which the Petition arises is a class action suit for securities fraud brought under the Montana Securities Act (Montana Code Annotated Sections 30-10-101 *et seq.*) and Montana common law. Petitioners are the stock brokerage firm and individual brokers who, in 1986 through 1989, marketed *from their offices in Montana* corporate bonds ("Homestead Bonds") issued by Homestead Savings, a federal savings and loan association of Millbrae, California. Petitioners promoted the Homestead Bonds as conservative, investment grade securities, suitable for elderly and fiduciary investors seeking a fixed rate of return with minimal risk. Washington Mutual Savings Bank ("Washington Mutual"), the parent corporation of Murphey Favre, joined in this marketing scheme by circulating *in Montana* financial reports which evaluated the Homestead Bonds as a secure, conservative investment. (Appendix 201a-202a)[1]

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1. All references to the Appendix are to the separate Appendix submitted with the Petition, except for Item R of the Appendix. Appendix R is an excerpt of Respondent's brief filed in the Montana trial court in opposition to Petitioners' motion to vacate that Court's order requiring notice to be sent to the Montana investors. Appendix R is attached at the end of this brief. It has been numbered consecutively (pages 196a-206a) with the pages in the separate Appendix submitted with the Petition.

Numerous Montana clients of Petitioners, including between 150 and 200 retired persons, trusts, and pension plans, invested in the Homestead Bonds pursuant to the recommendation of Petitioners. The bonds payed interest until the Spring of 1991. After unsuccessful efforts to reorganize its affairs under the supervision of the Federal Office of Thrift Supervision, the federal regulators assumed control over Homestead Savings in October, 1994. The Homestead Bonds became valueless at that point.

Respondent Lynn, who invested funds from his I.R.A. account in the Homestead Bonds, filed on February 11, 1993 the Montana Action as a class action on behalf of all Montana Homestead Bond purchasers. In July, 1993, seventeen additional Montana Homestead Bond investors joined in the Montana Action as individual plaintiffs, consenting to their representation by Respondent on the class action claims, and also asserting individual damage claims based upon the Montana Consumer Protection Act (Montana Code Annotated Sections 30-14-101 *et seq.*).[2]

One month ***after*** the Montana Action was filed, a group of Homestead Bond investors from the State of Washington filed a similar class action suit ("Washington Action") in a Washington State Court in Seattle,

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2. Montana is a Federal Rules state and allows liberal joinder of claims. The eighteen individual plaintiffs joined in the Montana Action for purpose of asserting any individual claims arising out of the Homestead Bond marketing scheme ***after*** the class action claims were resolved. The Montana Consumer Protection Act claim is such an individual claim.

Washington. While the two class actions both arose out of the marketing of Homestead Bonds, the claims raised in the two suits were ***not*** the same.

The Washington Action asserted claims under Washington law only, while the Montana Action asserted claims only under Montana law. Important for the present purposes, Washington law is much less favorable to defrauded securities purchasers than is Montana law. Washington does not allow punitive damages in any case, but Montana does allow punitive damages on common law fraud claims (Montana Code Annotated Sections 27-1-220 and 221). Noteworthy, there was significant evidence of fraudulent misconduct (such as alteration of client records to hide fraudulent activity and admitted misrepresentations of the market price of the bonds) in the Montana transactions which would support a punitive damage award. Further, the Washington Consumer Protection Act caps recoverable damages at $10,000 each plaintiff, while the Montana Consumer Protection Act has no cap and allows each plaintiff to recover three times her or his actual damages (Montana Code Annotated Section 30-14-133). (Appendix 202a-205a)

The Montana investors thus stood to gain far more in terms of monetary relief in the Montana Action (which was pending in the state of their residence) as their investments ran from $10,000 to $100,000 each. The liability case of the Montana investors under Montana law was also much stronger than that of the Washington

investors under Washington law.[3] For these reasons, joinder of the claims of the Montana investors and Washington investors in one class action suit presented a significant problem as to how any settlement proceeds would be allocated among the various claimants.[4]

The two class actions moved through pretrial proceedings for the first year, with the understanding that the claims of the Montana investors would be resolved in the Montana Action and the claims of the Washington investors would be resolved in the Washington Action. In the Spring of 1994, settlement negotiations were held in the Washington Action without notice to or involvement of Respondent Lynn or his counsel. Those negotiations resulted in a settlement of the Washington Action, but upon condition that the Washington class would be

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3. It is undisputed that the Washington Court applied Washington law to determine the rights of the Montana investors. This in itself was a violation of this Court's mandate in ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 818-19 (1985) that the substantive law of the state of residence of the absent class members must normally be applied to determine their rights.

4. Class counsel in the Washington Action refused to recognize this problem because he was motivated to obtain an attorneys' fee of $3.6 million from the Washington Action. (Appendix 16a) If separate subclasses of state investors were created in the Washington Action, independent counsel would have to be appointed to represent the conflicting interests of these subclasses with regard to allocation of the settlement proceeds. See ***Hansberry v. Lee***, 311 U.S. 32 (1940). This would inevitably require allocation of any attorneys' fees awarded to the class counsel. This is but another ground upon which the absent Montana class members could ***subsequently*** attack the jurisdiction of the Washington Court over them before the Montana Court. See generally, Appendix 197a-201a.

expanded to include all Homestead Bond investors, including the Montana investors, who were already named as class members in the Montana Action.

After reaching this settlement, class counsel in the Washington Action approached Respondent Lynn, requesting that the Montana class members be included as part of the settlement of the Washington Action. Respondent Lynn agreed to do so if the claims of the Montana investors were treated separately, by creating subclasses of Montana and Washington investors, for purpose of allocating the settlement proceeds among the class. This would enable the Montana investors to argue that they were entitled to a larger pro rata portion of the Washington settlement fund. Washington class counsel refused to treat the two groups of investors separately, so non-judicial efforts to include the Montana investors in the Washington settlement failed. (Appendix 200a)

Washington class counsel then elected to seek court approval of the Washington settlement, including the Montana investors as part of the Washington Action. After learning of this, Respondent Lynn (1) filed a motion in the Montana Action seeking court approval to send notice to the Montana investors advising them of their right to join in the Montana Action as opposed to the Washington Action, and (2) filed an "opt out" election on behalf of all Montana investors in the Washington Action (Appendix 77a-78a)

The Montana Court ruled on Respondent Lynn's motion to notify the Montana investors on December 5,

1994, ten days ***before*** the Washington Court considered the fairness of the settlement of the Washington Action. At that time the Montana Court ruled that notice should be sent to all Montana investors of their option to join in the Montana Action or to join in the settlement of the Washington Action.[5] (Appendix 135a-137a) Rather than comply with the Montana Court's order requiring notice to be sent to the Montana investors, Petitioners moved to vacate that order and pressed forward to obtain a favorable ruling from the Washington court on the enforceability of that settlement against the Montana investors without any notice to them of their option to join in the Montana Action. (Appendix 52a)

Petitioners were ultimately successful in the "race to judgment." Before the Montana Court could rule on their motion to vacate the order requiring notice to the Montana investors, Petitioners convinced the Washington Court to include the Montana investors in the Washington settlement, without creating subclasses of state investors. (Appendix 24a) The Washington Court did not, however, give Petitioners everything they wanted.

The Washington Court first ruled that Respondent

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5. Importantly, the notice sent to the class members in the Washington Action did ***not*** advise the Montana investors of the pendency of the Montana Action or of their option to join in a similar lawsuit in their home state. Rather, the notice gave the impression that the only option available to the Montana investors was to join in the Washington settlement or file an individual suit on their own behalf. This Court has noted the inefficacy of the later option to small securities investors. See ***Phillips Petroleum Co v. Shutts***, 472 U.S. 797, 812-13 (1985).

Lynn did not have standing to "opt out" the Montana investors from the Washington settlement, and that he did not have standing to challenge the jurisdiction of the Washington Court on behalf of the absent Montana investors. (Appendix 25a) This ruling was essential to sustaining jurisdiction over the Montana investors because, as held by this Court in ***Phillips Petroleum Co. v. Shutts***, 472 U.S. 797, 812 (1985), Due Process requires that absent class members be allowed the opportunity to "opt out" of the class action. Because Respondent Lynn had filed "opt out" requests in the Washington Action on behalf of all absent *Montana* Homestead Bond investors (Appendix 77a-78a), if he had standing to file those "opt out" elections, the jurisdictional issue would have been conclusively resolved against Petitioners at that point.

Importantly, this "standing" ruling had the effect of eliminating the absent Montana investors from any further participation in the Washington Action, including the proceedings to determine the jurisdiction of the Washington Court over them and the proceedings to determine the fairness of the Washington settlement with respect to the Montana investors' claims. When the Washington Court ruled that Respondent Lynn did not have "standing" to represent the Montana investors in the Washington Action, it necessarily followed that Respondent Lynn did not have authority to take any further action in the Washington Action *on behalf of the*

absent Montana investors.[6]

The Washington Court next considered sua sponte whether it had jurisdiction to include the Montana investors in the Washington Action. (Appendix 25a, 140a-141a) It ruled that it did have jurisdiction over the Montana investors who expressly "opted in" the Washington Action, and that Respondent Lynn and the other Montana investors who had joined in the Montana Action had validly "opted out" of the Washington Action. Significantly, the Washington Court further ruled that the question of its jurisdiction over the remaining Montana investors who had done nothing--that is, had joined neither the Montana Action nor the Washington Action--would be determined by *another* court in which the settlement was sought to be enforced against them. (Appendix 141a) So the Washington Court merely ruled that it had personal jurisdiction over those Montana investors who had expressly elected to join in the Washington Action.

Petitioners' then pending motion to vacate the Montana Court order requiring notice to be sent to the Montana investors of their option to join in the Montana Action (as opposed to participating in the Washington settlement) was heard approximately three weeks after the Washington Court ruled that the Washington settlement

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6. Respondent Lynn himself, and the seventeen other individual Montana investors who had joined in the Montana Action, had already "opted out" of the Washington Action by valid "opt out" requests. (Appendix 18a) So it is undisputed that the claims of Respondent Lynn and these other individuals will be tried in the Montana Action, regardless of any ruling on the jurisdictional issues involved in this Petition.

was enforceable against the Montana investors who had not "opted out" of that case. In the order in question on the instant Petition, the Montana Court denied Petitioners' motion to vacate the order requiring notice to the Montana investors, certified the Montana Action as a class action, and again ordered that the Montana investors be notified of their option to join either in the Montana Action or in the Washington Action. (Appendix 6a-10a)

The Montana Court was obviously perturbed at the concerted efforts of Petitioners to prevent the Montana investors from making an intelligent choice as to which action they desired to join. The Montana Court, in denying Petitioners' motion to vacate the order requiring notice to the Montana investors, discussed the effect of the Washington Court's order binding the Montana investors to the Washington settlement as follows:

> "In Phillips Petroleum Co. v. Shutts, (1985) 472 U.S. 797, 811-12, the U.S. Supreme Court determined that due process requires several conditions to be satisfied before a distant state forum may subject non-resident class members to [a] judgment entered in a class action. A key provision is that the class members be notified of their rights. This Court has attempted to ensure that the Montana purchasers be apprised of the Montana action, thereby allowing them a choice. They have not been so notified, through no fault of Plaintiffs' counsel, and this in itself ***may be*** sufficient to invalidate the Washington Court's exercise of jurisdiction over the Montana bond

> purchasers. *Further, the Court has been witness to a deluge of documents, which have tended to obfuscate and delay rather than enlighten and expedite these proceedings.* For these reasons, the Court feels that notification is still a relevant and proper procedure." (Appendix 6a-7a) [Emphasis added]

So the Montana Court did not, as stated by Petitioners, rule that the Washington Court judgment was not binding on the Montana investors. Rather, it merely reaffirmed its prior order, made ***prior to*** the Washington Court's jurisdictional ruling, that the Montana investors should be first given notice of all options available to them before deciding in which action they desired to participate. This was important because, under the Washington settlement, those Montana investors who did nothing (neither "opted in" nor "opted out" of the Washington Action) would be barred from seeking any relief from Petitioners, yet they would receive *no settlement monies* from the Washington settlement. (Appendix 9a, 15a [see footnote 1]).

SUMMARY OF ARGUMENT

This reply will establish that the Petition should be denied for four reasons.

First, the Montana Courts have not made any "final" ruling on any jurisdictional or class certification issue. The Montana Courts have not refused to afford "full faith and credit" to the Washington judgment. They have not yet reached that issue. The Montana trial court has merely required that notice be sent to the Montana investors so that they can decide whether to remain as part of the Washington settlement, or to join in the Montana Action and then *subsequently* challenge the enforcement of the Washington judgment against them. The Montana Supreme Court declined to review that interlocutory order at this time because Petitioners had an adequate remedy by appeal from any final judgment entered in the case. This case is not yet ripe for review by certiorari.

Second, there is no issue in this case, as claimed by Petitioners, of two jurisdictional attacks by Respondent Lynn in violation of this Court's holding in ***Durfee v. Duke***, 375 U.S. 106 (1963). The Washington Court denied Respondent Lynn "standing" to represent the Montana investors in the Washington Action. So any action he took in that case could not bind or affect the absent Montana investors. Indeed, the Washington Court itself recognized that it was considering the jurisdictional issues ***sua sponte***, without participation by any of the absent Montana investors. The Washington Court even went so far as to hold that its jurisdiction over absent

Montana investors who had not expressly elected to participate in the Washington Action would have to be decided by another court on another day. Any subsequent attack by the absent Montana investors on the Washington judgment will be the *first time* that they have ever had their day in court on any jurisdictional issue.

Third, the issues presented by the Petition may well become moot as a result of subsequent proceedings in the Montana trial court. After the absent Montana investors receive notice of the Montana Action, they will be presented with two options. They may elect to remain as participants in the Washington settlement, in which event they will be excluded from participation in the Montana Action. That would moot any jurisdictional issue presented by the Petition. On the other hand, they might elect to participate in the Montana Action. If they do so, then proceedings will be held in the Montana Action to determine if they are bound by the release of claims in the Washington judgment. The Montana Court might decide that they are so bound, in which event the jurisdictional issue presented by the Petition would again be moot. Only if the Montana Court decides that the Montana investors electing to participate in the Montana Action are not bound by the Washington judgment will there exist the conflicting jurisdictional determinations which Petitioners bemoan. This is simply not the time to review jurisdictional issues which may or may not arise.

Fourth, Petitioners are not presented with the prospect of defending a duplicitous lawsuit as they claim. Regardless of this Court's disposition of the Petition, the

claims of the eighteen individual Montana investors who "opted out" of the Washington Action and joined in the Montana Action *will be tried* in the Montana Action. At worst, Petitioners will be faced with the prospect of additional damages being awarded in the Montana Action by reason of the inclusion of additional claimants in the case. Any jurisdictional issues still present after trial can be easily, and more appropriately, resolved on appeal from an adverse judgment.[7] On the other hand, if this Court rules upon the jurisdictional issues now, it will do so without the absent Montana investors ever having their day in court on those issues. At least for those Montana investors who received nothing from the Washington settlement, they would be denied the opportunity to participate in the benefits of the Montana Action. Yet they would receive nothing in exchange for the release of their claims by a distant state court in a lawsuit in which they were effectively unrepresented.[8]

For these reasons, the Petition should be denied and the Montana Action allowed to proceed to a final resolution of all issues.

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7. Indeed, if Respondents and the other individual plaintiffs are not successful on the merits of their claims against Petitioners, there will be no adverse judgment against Petitioners. This is yet another reason for establishing that the issues presented by the Petition may become moot and that they are not yet ripe for resolution by this Court.

8. Washington class counsel refused to allow the creation of subclasses by state investors in the Washington Action, and was thus in a position of representing class members with conflicting interests. This in itself rendered his representation of the Montana class members inadequate, requiring the Washington judgment to be set aside. See footnote 4, ***supra***.

ARGUMENT

A. The Montana Courts Did Not Rule Upon Any Jurisdictional Issues

Contrary to Petitioners' assertion (Petition 11-13), the Montana Courts did not rule upon any jurisdictional issues. The Order in question (Appendix 7a) specifically states that the failure of the plaintiffs in the Washington Action to notify the Montana investors of their option to join in the Montana Action ***may be*** sufficient to deprive the Washington Court of jurisdiction over them. It does not hold that the Washington Court did not have jurisdiction over the Montana investors.

Further, this Order goes on to merely require that the Montana investors be given notice of the Montana Action so that they are afforded the option of deciding in which case they desire to participate. (Appendix 7a) Only after the absent Montana class members make this choice could any jurisdictional issues conceivably be involved in this case. Until this choice is made, no jurisdictional issue ***could be*** decided by the Montana Courts.

Petitioners seek *certiorari* under the jurisdiction granted this Court by 28 U.S.C. § 1257, which provides, in part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court ... " There is no "final" judgment here on *any* issues, let alone on the jurisdictional issues claimed by Petitioner.

In these proceedings, Petitioners seek review of the trial court's order certifying a class of Montana purchasers of Homestead bonds. Because an order certifying a class is not appealable of right in Montana [Rule 1(b)(2), Montana Rules of Appellate Civil Procedure] — as is true in the federal courts — Petitioners sought interlocutory review through a writ of supervisory control from the Montana Supreme Court. The Montana Supreme Court, however, did not address the merits of the class certification. Instead, the Montana Supreme Court held that Petitioners failed to show that they would be sufficiently prejudiced by having the Montana Supreme Court review the class certification order through the normal appellate process once a final judgment was entered in the trial court. (Appendix 2a)

Similarly, it would be inappropriate for this Court to grant *certiorari* to review the trial court's order granting class certification. As this Court has concluded that orders denying class certification in the federal system are not appealable as final orders, it is inappropriate to treat class certification issues pertaining to state litigation as final orders subject to Supreme Court review. See ***Coopers & Lybrand v. Livesay***, 437 U.S. 463 (1978).

The only case cited by Petitioners to support their claim of jurisdiction is ***Fisher v. District Court of the 16th Judicial District of Montana***, 424 U.S. 382 (1976). In ***Fisher***, the trial court concluded that it lacked jurisdiction over an adoption proceeding involving tribal members living on a reservation. The Montana Supreme Court considered the merits of that decision and reversed

the trial court, holding that Montana courts had jurisdiction over the adoption proceeding. 424 U.S. at 385. This Court held that the tribal court had exclusive jurisdiction over the adoption proceedings. 424 U.S. at 389. Because the highest court in the state had finally decided the federal issue, it was appropriate for this Court to accept *certiorari*. Moreover, ***Fisher*** involved the strong federal policy prohibitting state interference with the exclusive jurisdiction of tribal courts over tribal members. See ***Merrion v. Jicarilla Apache Tribe***, 455 U.S. 130, 102 S.Ct. 894, 918 (1982).

In the case at hand, however, the highest court of Montana has not spoken to the merits of the jurisdictional issues, but will do so later. Moreover, there are no strong federal policy considerations present here, such as protecting tribes from interference with their inherent sovereign authority. ***Fisher*** is not apposite to the instant situation.

This Court has determined that there are four limited circumstances under 28 U.S.C. § 1257 where this Court may review decisions by a state's highest court even though further proceedings remain in the state system. ***Cox Broadcasting Corp. v. Cohn***, 420 U.S. 469 (1975).

The first category are cases where there are further proceedings yet to occur, but where for one reason or another the determination of the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the

federal issue is deemed final. *Cox*, 420 U.S. at 479.

In the present case, a final decision on the claimed federal issue is neither conclusive nor is the outcome of further proceedings preordained. Class certification orders are always subject to change through final judgment. As one Court has noted:

> "[A]n order of a trial court which merely grants a request that an action proceed as a class action * * * * is not a final decision. ***Hellerstein v. Mr. Steak, Inc.***, 531 F.2d 470, 472 (10th Cir. 1976), *cert. denied*, 429 U.S. 823 (1976).

Further, the jurisdictional issues presented by the Petitioners have yet to be considered by either Montana Court. If, after the trial court has finally resolved all class issues, including whether the absent Montana class members are bound by the Washington judgment, the Montana Supreme Court concludes that the Petitioners are correct, then it can reverse or vacate the portion of the judgment awarding those investors relief. Thus, the outcome of further proceedings in the Montana courts is hardly "preordained."

The second circumstance under which interlocutory orders may be deemed final is when "the federal issue, finally decided by the highest court in the State, will survive and require a decision regardless of the outcome of future state court proceedings." *Cox*, 420 U.S. at 480. As discussed above, the federal issues have not been decided ***at all*** by either of the Montana courts, let alone "finally"

decided. And it is entirely possible that this jurisdictional issues will become moot as a result of further proceedings in the trial court. See pages 23-25, ***infra***. In short, the federal issues may disappear as a result of future proceedings in the Montana Courts, so this exception is inapplicable.

The third category includes cases where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. *Cox*, 420 U.S. at 481. Here, Petitioners still have the right to have the class certification issues — including any related federal jurisdictional issues — reviewed as a matter of right by the Montana Supreme Court. Indeed, the Montana trial court might yet rule favorably to Petitioners on the jurisdictional issues. Review of the jurisdictional issues on appeal from a final judgment is not only available here, but is the preferred course in light of the possibility that further orders may moot the need for ultimate review of these issues.

The final category permitting review of interlocutory rulings is for cases where the federal issue has been finally decided in the state courts, with further proceedings pending in which the parties seeking review here might prevail on the merits on non-federal grounds, but where reversal of the state court on the federal issue would be preclusive of any further litigation in the state court. In this circumstance, if a refusal immediately to review the state court decision might seriously erode federal policy, this Court has entertained and decided the

federal issue, which itself has been finally determined by the state courts for purposes of the state litigation. *Cox*, 420 U.S. at 482-83.

Once again, however, the Montana State Supreme Court has not decided the merits of the class certification issues. Additionally, neither the Montana trial court nor the Montana Supreme Court has decided the merits of any of the federal jurisdictional issues. The Montana Supreme Court has only decided that these issues should be reviewed on an appeal of right when the trial court enters its final judgment.

In *Cox*, this Court noted that the state court's judgment in that case was "plainly final on the federal issue and is not subject to further review in the state courts." 420 U.S. at 485. This Court also expressed concern that, if the petitioners in that case prevailed on different grounds at the trial court, a published decision of the Georgia State Supreme Court, holding that a civil action for publishing the name of a rape victim may proceed despite the First and Fourteenth Amendments to the Constitution, would remain unreviewed by this Court and could "leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt ... " 420 U.S. at 486.

In this case there are no similar concerns. Other than claiming that trying the case as a class action (instead of simply on behalf of 18 plaintiffs) will raise the complexity of the case, and suggesting that class actions

as a whole are frivolous (a questionable assertion at best), Petitioners have made no argument that there is a strong federal policy to be supported by grant of *certiorari* to deal with a small portion of this case. There are no published decisions implicating any federal policies, let alone those underlying the freedom of press concerns involved in ***Cox***. There is no final determination of any federal issue here as was true in ***Cox***.

The procedures followed by this Court in reaching its decision in ***Philips Petroleum Co. v. Shutts, supra,*** demonstrate the appropriate disposition of this case. In ***Shutts***, a class was certified in Kansas state court that included class members from all 50 states. The order certifying the class raised issues of the state court's jurisdiction over non-resident absent class members, and *mandamus* was sought from the Kansas Supreme Court to decertify the class, which was denied. ***Philips Petroleum v. Duckworth***, No. 82-54608 (Kan. June 28, 1982). Review was sought of the denial of the *mandamus* petition, and this Court denied *certiorari*. 459 U.S. 1103 (1983). See ***Shutts***, 472 U.S.at 801.

Following a trial on the merits, the Kansas Supreme Court decided the merits of the class certification issues, holding that the trial court had jurisdiction over non-resident absent class members, and that Kansas law should apply to all claims. 472 U.S. at 803. This Court held on appeal from this final judgment that, under the facts of that case, the Kansas court had jurisdiction over the absent class members, but reversed the holding that Kansas law was applicable to all of the claims. 472 U.S. at 823. This

Court should follow the procedure used in ***Shutts*** to review — if necessary — the class certification issues in this case which may remain once a final, appealable judgment has been entered.

B. The Absent Montana Class Members Are Not Attacking Jurisdiction of the Washington Court Twice

Petitioners contend that Respondent Lynn is directly attacking the jurisdiction of the Washington Court twice, in violation of this Court's ruling in ***Durfee v. Duke***, 375 U.S. 106 (1963). (Petition 13-18) Petitioners' argument ignores the very rulings made by the Washington Court under which they seek shelter.

The Washington Court specifically ruled that Respondent Lynn did not have "standing" to represent the absent Montana class members in the Washington Action. (Appendix 25a) This case does ***not*** involve the rights of Mr. Lynn to attack the Washington judgment. It is undisputed that he validly "opted out" of the Washington Action, and that the Washington Court did not have jurisdiction over his claims. (Appendix 18a) See ***Shutts***, 472 U.S. at 812. What is at issue is the jurisdiction of the Washington Court over the ***absent*** Montana class members, who never appeared in the Washington Action because of the Washington Court's decision denying standing to Mr. Lynn to represent them.

Durfee involved two attacks, direct and collateral, against the jurisdiction of the judgment rendering court,

both brought by the *identical* party. ***Durfee***, 375 U.S. at 110. That has not happened here. The absent Montana class members have never had their day in court to challenge the jurisdiction of the Washington Court over them. Indeed, the Washington Court itself recognized this and held that it would not consider whether it had jurisdiction over those absent Montana class members who had neither "opted in" nor "opted out" of the Washington Action, for "that argument will be for another day." (Appendix, 141a)

The essential underpining of ***Durfee***, and of the claims raised by Petitioners in this proceeding, is that the issue of the jurisdiction of the first forum have been "fully and fairly litigated by the parties and finally determined in the [forum] courts. . ." ***Durfee***, 375 U.S. at 116. There was no "full and fair litigation" of the Washington Court's jurisdiction over the absent Montana class members in that Court by the only parties adversely affected by that decision--*the absent Montana class members*. At most, the Washington Court (as it expressly recognized) considered the issue ***sua sponte***. And the only argument it received was from parties who were uniformly interested in sustaining that judgment, Petitioners to obtain releases of their claims and Washington class counsel to obtain a $3.6 million attorney's fee. See footnote 4, ***supra***.

The only "full faith and credit" principle applicable to this case is the cardinal rule noted by this Court in ***Shutts***, 472 U.S. at 805: "[A] judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no

res judicata effect as to that party." The absent party is always entitled to collaterally attack the judgment because he did not have the opportunity to "fully and fairly litigate" the jurisdiction of the distant forum over him in that forum. Because Respondent Lynn did not have standing to represent the absent Montana investors in the Washington action, his limited participation in that action can not bind them. There is no double jurisdictional attack here as was present in *Durfee*.[9]

C. The Jurisdictional Issues May Become Moot As A Result Of Further Proceedings In The State Courts

The Montana trial court merely ordered that notice be sent to the absent Montana class members of their right to participate in the Montana Action. (Appendix 6a-7a) After notice is sent, the absent Montana investors will have two options. Those who participated in the Washington settlement may elect to stay with that settlement, in which event they will "opt out" of the Montana Action. No jurisdictional issue would be presented for these class members as they would have

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9. The case of ***Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Ins. Guaranty Assn.***, 455 U.S. 691 (1982), cited by Petitioners (Petition 14, 15, 18), is also distinguishable on this basis. In ***Underwriters National***, the identical party sought to challenge the jurisdiction of the first forum, where it had directly participated in the proceedings before the first forum. The only additional issue present was its failure to raise certain jurisdictional arguments before the first forum. However, that was immaterial in light of the established rule of "res judicata" law that a judgment binds a party not only on issues actually litigated, but also on issues which *could have been* litigated. 455 U.S. at 708-10.

voluntarily waived their right to challenge the Washington judgment.

The other option would be to participate in the Montana Action. For this potential group of Montana investors, *subsequent* proceedings would be held in the Montana Action to determine if they are bound by the release of claims in the Washington judgment. These investors would then be able to raise all of their jurisdictional challenges to the Washington judgment. And importantly, Petitioners would be entitled to assert that they are bound by that judgment, because of "full faith and credit" principles or any other reasons available to them.

With respect to this latter group of investors, the Montana Courts might decide that they are bound by the releases contained in the Washington judgment. In this event the jurisdictional issue presented by the Petition would again disappear. Only if the Montana trial court rules that the Montana investors electing to participate in the Montana Action are not bound by the Washington judgment, ***and*** the Montana Supreme subsequently affirms that ruling on appeal, will there exist the conflicting jurisdictional determinations about which Petitioners complain.

As is evident from this scenario, several events may occur in the Montana Courts to moot the jurisdictional issues presented by the Petition. It is axiomatic that where further action in state proceedings could render any federal constitutional issues moot, the case is not ripe for

consideration by this Court. See ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172 (1985). Such is the situation here. No "full faith and credit" issues may arise depending on future proceedings in the Montana Courts.

D. Petitioners Will Not Suffer Any Prejudice As A Result Of Defending This Case Through Final Judgment

Petitioners final argument is that they will be prejudiced by being forced to defend a meritless class action. (Petition 21-27) This is a "red herring".

Whether or not this Court accepts jurisdiction of the Petition, and regardless of its ruling on the "full faith and credit" issues, the Montana Action will proceed forward to judgment on the claims of the eighteen individual Montana investors who "opted out" of the Washington Action and joined in the Montana Action. The same liability and damage issues will be tried in the Montana Action even if this Court were to rule that the Washington judgment bars the claims of all Montana investors excepting only the claims of these eighteen individual investors. The only additional burden interjected in the case by denying review at this time is that Petitioners could be exposed to larger damages, depending on the rulings of the Montana Courts on the binding effect of the Washington judgment on the absent Montana class members. This is not the type of prejudice which warrants immediate review by this Court.

On the other hand, review of the "full faith and credit" issues now will clearly prejudice the absent Montana investors who have never had their day in court. None of these investors has ever been provided the opportunity to argue that the Washington Court should not have exercised jurisdiction over their claims. The only argument attempted to be made on their behalves was not considered by the Washington Court because of its ruling that Respondent Lynn did not have "standing" to represent them. And the other parties to the Washington Action who were heard on this issue both had interests *directly conflicting* with those of the Montana investors. Petitioners desired to sustain jurisdiction over their claims in order to obtain binding releases of those claims. Further, Washington class counsel was blinded by the glare of a $3.6 million attorney's fee when he argued that the Washington Court had jurisdiction over their claims. See footnote 4, ***supra***.

The absent Montana investors should be allowed to express their own opinions as to the action in which they wish to resolve their claims. The Montana trial court has so ruled, and noted the tenacity with which Petitioners have attempted to deny them this choice. (Appendix 6a-7a) Allowing them this opportunity will also create an adequate factual record, through the efforts of truly adversarial parties, which will enable this Court (if necessary) to intelligently consider the merits of the jurisdictional issues. Review at this time will accomplish little, if anything, for Petitioners, but most assuredly will deny the absent Montana investors their day in court and burden this Court with an incomplete factual record.

CONCLUSION

The Order of the Montana Court does not finally adjudicate any jurisdictional issues, and is not ripe for review at this time, because the Montana Courts have not made any final jurisdictional rulings. Second, the Order does not constitute a second adjudication of jurisdictional issues as prohibitted by ***Durfee v. Duke***, but the first time the *absent class members* would even have the opportunity to attack the jurisdiction of the Washington Court. Third, the Order may become moot as a result of subsequent proceedings in the trial court, including elections by the absent Montana class members to remain as participants under the Washington settlement. Finally, there is no prejudice to Petitioners by delaying consideration of any jurisdictional issues until after final judgment as they will in any event have to defend through trial the claims of the eighteen individual plaintiffs in the Montana Action.

For these reasons, Respondent Lynn respectfully requests this Court to deny the Petition.

Respectfully submitted,

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APPENDIX R

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MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

PAUL M. LYNN, on behalf of all similarly situated persons, Class Plaintiff, -vs- MURPHEY FAVRE, INC., et al, Defendants.	**DEPT. NO. 2 (HENSON)** Cause No. 77454
PAUL M. LYNN, an individual, MARGARET E. MANDELL and	**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO**

KIRK G. COMISKEY, et al,	) **VACATE ORDER**
	) **ALLOWING**
Individual	) **COMMUNICATION**
Plaintiffs,	) **WITH MONTANA**
-vs-	) **BOND PURCHASERS**
	)
MURPHEY FAVRE, INC., a corporation; et al,	) *[EXCERPT]*
Defendants.	)

Plaintiffs respectfully submit the following Memorandum in Opposition to Murphey Favre's Motion to Vacate Order Allowing Communication with Montana Bond Purchasers ("Motion to Vacate") filed on December 8, 1994:

* * * * * * * * * * * *

(4) There Was a Conflict of Interest Between the Montana Purchasers and Washington Purchasers, Thereby Rendering Their Representation by One Counsel a Denial of Due Process

Shutts held that a constitutional requirement to sustaining jurisdiction over nonresident plaintiffs in a class action is that "the named plaintiff at all times adequately represent the interests of the absent class members," citing Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115 (1940). In Hansberry, the U.S. Supreme Court voided, on collateral

attack, a class judgment which purported to bar the claims of property owners which had been adjudicated in an action where the members of the class had conflicting interests, but were represented by one party and counsel.[1] The Court held that "[b]ecause of the dual and potentially conflicting interests of those who were putative parties" to the class, their representation by one class representative denied them "due process" of law and rendered the resulting judgment void.

Subsequent cases have applied the Hansberry rule to void class actions settlements where "the members of [the] class have antagonistic or conflicting interests" with respect to the terms of the settlement, and are represented by one party. See, e.g., Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 697-98 (7th Cir. 1987) [class included all members of union pension plan; one group of class favored liberalization of pension benefit rules, which would expand the class, while members of the other group were pursuing claims for asset mismanagement; because every dollar allocated to the benefit liberalization group would reduce by one dollar that available for the asset mismanagement group, the court found "an obvious conflict of interest" between the two groups which rendered their representation by one party constitutionally defective]; Hooks v. General Finance Corporation, 652 F.2d 651, 652 (6th Cir. 1981) [class action for violation of

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1. The class in Hansberry included all property owners whose properties were subject to a restrictive covenant. Some of the class members wanted to enforce the covenant, while others did not. The Court held that these "dual and potentially conflicting interests" prohibited their representation by one party, thereby voiding the judgment as a violation of the Due Process Clause.

Truth in Lending Act; class representative sought full statutory award for himself ($1,000) even though class members would be restricted to pro rata share of recovery (which could be less than $1,000); because of potentially conflicting positions on allocation of damage or settlement award, class representative precluded from maintaining class action on behalf of group]; Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459, 463-64 (10th Cir. 1974) [members of plaintiff class included competitors who might disparately benefit from a judgment declaring certain pricing methods of defendant to be unlawful; class certification denied; the court noted that "this requirement of adequate representation must be stringently applied because members of the class are bound unless they affirmatively exercise their option to be excluded, even though they may not be actually aware of the proceedings" (Emphasis added)]; Phillips v. Klassen, 502 F.2d 362, 366-67 (D.C.Cir. 1974) ["Class members whose interests are antagonistic in fact to, or even 'potentially conflicting' with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process, to an adjudication in their name"; where class members may potentially have divergent views as to the conduct of the action, representation by one class member denies all due process of law; existence of "opt out" right does not cure problem].

In this case, the class in the Washington Class Action included both Washington and Montana bond purchasers. The Montana purchasers believed that their claims were more valuable because of the more liberal Montana damage laws and the stronger evidence of fraud in the Montana case. Accordingly, the Montana

purchasers felt that a larger pro rata share of the settlement proceeds should be attributed to their claims, as compared to that allocated to the claims of the Washington purchasers. Despite this obvious conflict of interest, only one party [Washington purchasers] and one attorney [who represented the Washington purchasers] represented the interests of all. Separate and independent attorneys should have represented each group in the settlement negotiations.

Further compounding this conflict was the ruling of the Washington Court that counsel for Mr. Lynn did not have standing to challenge the settlement on behalf of any of the Montana purchasers. The Washington Court permitted Washington counsel alone to argue the fairness of the settlement for Montana purchasers. (Youtz Affidavit, ¶ 11; Supp Hall Affidavit, Exhibit B, page 7) Not only did this attorney stand to gain significantly from approval of the settlement as structured (his firm was awarded $3,600,000 in attorneys' fees--Supp Hall Affidavit, Exh B, p. 5), but he presented a distorted and inaccurate presentation of Montana law to the Washington Court which ignored the rulings of this Court. (Snavely Affidavit, Exhibit G; see discussion, pp. 20-23, infra) Independent Montana counsel who could vigorously present the position of the Montana purchasers that they were entitled to a larger pro rata share of the settlement proceeds should have been appointed.

The inherent conflict of interest between the Montana and Washington purchasers with respect to the allocation of the Washington settlement proceeds rendered their representation by one party constitutionally defective. The interests of the Montana purchasers were not "adequately represented", thus voiding the Washington

judgment as a denial of "due process" for the Montana bond purchasers. Shutts, supra, 472 U.S. 812, 105 S.Ct. 2974.

(5) The Washington Court Considered the Benefits of the Settlement Under a Biased Presentation of Montana Law, Thereby Denying "Due Process" to the Montana Class Members

Shutts finally teaches that the Due Process clause requires the court in a class action to apply the substantive law of the state of residence of the nonresident plaintiffs in determining their rights. Shutts, 472 U.S. 821-22, 105 S.Ct. 2979. The forum court may only apply its own law to the claims of the nonresident plaintiffs if that state has "'significant contact[s] or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests', in order to ensure that the choice of [forum] law is not arbitrary or unfair." Id. The fact that the defendant owned property and conducted substantial business in the forum was not controlling. Shutts, 472 U.S. 819-20, 105 S.Ct. 2978. Rather, the expectation of the parties, based upon their residence and the situs where the subject contracts were made, was important. Shutts, 472 U.S. 822, 105 S.Ct. 2980. In Shutts, this required the law of the plaintiffs' residence to be applied.

In this case, Washington has no contacts whatsoever with the sales of Homestead Bonds to Montana purchasers. All Montana transactions were consummated in Montana, with Montana residents,

through the Defendants' offices and agents located in Montana. The only "Washington" connection for the transactions at issue in this case is the fact that the Defendants' home offices are located there. Because the Defendants chose to reap the benefits of Montana business in Montana, they must have their liabilities resulting from that business adjudicated under Montana law.

The Washington Court was presented with a biased and inaccurate presentation of Montana law by Washington attorneys who sought to gain $3,600,000 in fees from a ruling that Montana law was not more favorable than Washington law. Attached as Exhibit "G" to the Snavely Affidavit is a copy of the memorandum submitted to the Washington Court which contained the argument of Washington counsel as to the relative merits of Washington and Montana law. The following is a comparison of Montana law as represented by Washington counsel [indicated by "WA1", "WA2", etc][2] with the actual status of Montana law [indicated by "MT1", "MT2", etc] as previously determined by this Court or otherwise cited:

WA1. Washington "fraud" statute of limitation is 3 years, which is more liberal than Montana 2 year statute. Montana statute likely ran on Montana purchasers because of SEC filing in 1991 and drop in price by 1991. Wash.Brief, pp. 2-3.

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2. These items appeared in a table in original brief. Because table would not fit within margin requirements of this brief, table has been edited to appear as below. Substance of information is unchanged from original brief filed in state court.

MT1. Montana "fraud" statute of limitation did not commence until Homestead was declared insolvent (Nov. 1992) because Montana purchasers were not damaged until then. SEC Report not sufficient to provoke "discovery" by Montana purchasers. 2/16/94 Order, pp. 5-6.

WA2. Montana court ruled that "significant issues exist as to whether the Montana court has personal jurisdiction over Washington Mutual as a defendant." Wash.Brief, p. 4, ll. 2-4.

MT2. Plaintiff's Complaint does not clearly state a claim for relief against Washington Mutual, so Motion for More Definite Statement granted. 2/16/94 Order, pp. 10-11. Plaintiffs cured defect by filing Second Amended Complaint on 4/4/94. See Second Amended Complaint, ¶¶ 4, 7, 8, 28, 29, 42. This Court has not ruled upon, or made any indication of its position on, Washington Mutual's motion to dismiss for lack of personal jurisdiction.

WA3. Treble damage claims under Montana Consumer Protection Act are likely to be time barred because of applicable two year statute of limitations [MCA §27-2-211(1)(c)]. Further, Montana CPA claims can not be asserted in a class action, which would likely preclude their assertion by Montana purchasers. Wash. Brief, pp. 4-5. This argument was made to counter the admitted fact that the Washington CPA allows a maximum recovery of $10,000, while the Montana CPA has no such limit, allowing recovery of three times actual damages. (See Entriken v. Motor Coach Federal Credit Union, 256 Mont.

85, 93-94, 845 P.2d 93, 98 (1992))

MT3. Absent a specific limitation period in statute creating remedy, general rule is that longest pertinent limitation period is applied. Because statutory claim based on securities transaction is essentially contractual in nature, 8 year contract limitation period applies to CPA statutory claim based on securities transaction. Two year limit in MCA §27-2-211(1)(c) is not applicable. Thiel v. Taurus Drilling, Ltd. 1980-II, 218 Mont. 201, 212-13, 710 P.2d 33, 40 (1985). Montana CPA has no specific limitation period, thus longer contract limit (8 years) is applicable. Further, Montana CPA claims may be joined in class action suit and damages awarded as part of individual relief. State ex rel Boyne USA, Inc. v. District Court, 228 Mont. 314, 316, 742 P.2d 464, 465 (1987).

WA4. Although Washington does not allow recovery of punitive damages in any circumstance, and Montana allows punitive damages in common law "fraud" cases, punitive damages are not recoverable in Montana in a class action. Wash. Brief, pp. 5-6. Further, the evidence in the Washington case did not reveal sufficiently egregious conduct to warrant an award of punitive damages. Wash. Brief, p. 8.

MT4. Punitive damages are recoverable in a class action. State ex rel Boyne USA, Inc. v. District Court, 228 Mont. 314, 316, 742 P.2d 464, 465 (1987); Cecil v. Allied Stores Corp., 162 Mont. 491, 493, 513 P.2d 704, 705. There is significant evidence of fraudulent activity in the Montana transactions, including the regular fraudulent

alteration of client account records and account agreements to "cover up" the misrepresentations made during the initial bond sales. Damaging admissions were made by the Defendants in the Montana case. (Snavely Affidavit, ¶ 7)

WA5. Montana law requires "scienter"--an intent by the defendant to deceive the securities purchaser--in order to establish a securities fraud claim. Montana law also requires "loss causation"--not only that plaintiffs relied on the misrepresentations but also that the defendant's conduct affected the value of the security--in order to establish a securities fraud claim. Wash.Brief, pp. 9-10.

MT5. "Scienter" is not required to establish a securities fraud claim. A negligent misrepresentation is sufficient, even if the defendant believed his statements to be true. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 Mont. 1, 11-12, 640 P.2d 453, 458-59 (1982). Montana law only requires "proximate causation" in a securities fraud case, which is established where Plaintiff's reliance on the misrepresentation and his resulting loss of investment was reasonably foreseeable by the Defendants. Kitchen Krafters, Inc. v. Eastside Bank of Montana, 242 Mont. 155, 169-70, 789 P.2d P.2d 567, 575 (1990); 2/16/94 Order, p. 7; Second Amended Complaint, ¶ 30.

The foregoing comparison establishes that Plaintiffs' counsel in the Washington Class Action presented a totally distorted and inaccurate picture of Montana law to the Washington Court. The effect of his

argument was to apply Washington law, or some hybrid mix of Montana and Washington law, to the Court's consideration of the fairness of the Washington settlement. Shutts teaches that application of any law other than that of Montana to consideration of the fairness of the Washington settlement for Montana purchasers is prohibited. For this additional reason, the Washington judgment violates the "due process" rights of the Montana purchasers. That judgment may thus not be recognized for any purpose by this Court.